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No. 82-686

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1982

A. V. COSTANTINI,
dba UNITED TRAVEL SERVICE,
dba WARDS TRAVEL SERVICE,
Petitioner,

VS.

TRANS WORLD AIRLINES, INC., DOES I through XC,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The only question presented is whether settled principles of *res judicata* were correctly applied by the Ninth Circuit Court of Appeals in affirming the District Court's dismissal of petitioner's diversity action against respondent* based on state common law.

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*Pursuant to Supreme Court Rule 28.1, respondent Trans World Airlines, Inc. has the following parent companies, subsidiaries and affiliates: Transworld Corporation (parent); Canteen Corporation, Dunhill Personnel, Inc. Century 21 Real Estate, Hilton International Co., Spartan Food Systems, Inc. (affiliates).

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STATEMENT OF THE CASE

As set forth in the opinion of the Ninth Circuit (Appendix A to the Petition), reported at 681 F.2d 1199 (9th Cir., 1982), petitioner A. V. Costantini asserted a single claim for relief against respondent Trans World Airlines, Inc. ("TWA"). Founded on diversity jurisdiction (A-5), petitioner revived his previously asserted, and rejected complaint that in 1972 and 1973 TWA interfered

with petitioner's alleged license agreement to operate travel agencies in Montgomery Ward's branch stores (A-11). This repetitious litigation was dismissed on the obvious grounds of *res judicata*.

The petition here is simply a bare recitation of accusatory facts, which fails to address either the basis of the decision below or the standards for this Court's grant of certiorari to review that decision, pursuant to Supreme Court Rule 17.1. The petition just omits the critical issue determined adversely below—the fact that this dismissed complaint against TWA followed an earlier one, whose dismissal was also affirmed on appeal (A-4), which asserted the "identical" cause of action (A-11). Indeed, the whole basis of the dismissal, and its affirmance by the Ninth Circuit, was *res judicata*.

The Ninth Circuit concluded, as the District Court had, that petitioner was attempting to relitigate the exact same cause of action he had previously asserted against TWA and which went to a final judgment against him (A-4). Petitioner's earlier action was even broader in scope (A-3 to A-4), and asserted the same claim and theory of TWA interference with his Montgomery Ward business (A-9, *et seq.*). Thus, the petitioner's claim of newly discovered evidence, though inadequate in any event for his want of diligence (A-13), could hardly change the fact that the entire cause of action was itself barred by *res judicata*.

The instant petition, fairly construed, raises the sole question of whether petitioner's repetitive common law complaint was properly dismissed on *res judicata* grounds. That question, TWA submits, was correctly decided below and in any event does not justify review by this Court.

SUMMARY OF ARGUMENT

TWA has been in litigation with petitioner since February 1974 (A-3). His complaints have now twice been dismissed, and the dismissals have now twice been affirmed by the Ninth Circuit (A-4). There is no basis whatsoever for review in this Court. None of the grounds set forth in Supreme Court Rule 17.1 is even suggested, let alone established. At best, the petition involves a state law issue governed by settled principles of *res judicata*.

ARGUMENT

THE PETITION SUGGESTS NO CONFLICT AMONG FEDERAL CIRCUITS OR WITH A STATE COURT OF LAST RESORT, NO IMPORTANT OR UNSETTLED QUESTION OF FEDERAL (OR STATE) LAW, NOR ANY OTHER REASON FOR GRANTING CERTIORARI EXCEPT AN ALLEGED ERROR IN DECIDING A STATE LAW CLAIM UNDER THE DOCTRINE OF RES JUDICATA

Petitioner cites no "special and important reasons"—and there are none—for an exercise of this Court's discretionary review. Sup. Ct. Rule 17.1. There is no suggestion of any conflict with other circuits or California's court of last resort; or of any departure from accepted procedure; or of any important or unsettled question of federal law. Quite to the contrary, petitioner's whole argument is that the Ninth Circuit simply failed to follow petitioner's view of the law.

The Ninth Circuit's reasoning completely and correctly disposed of petitioner's argument to the merits, yet his petition fails even to address that reasoning. It only rehashes his previously litigated substantive claim, baldly

asserting that he *was* diligent enough to relitigate his claim based on so-called newly discovered evidence. Yet that attempt to save the claim was also completely disposed of by the court below.

Finally, petitioner has asserted a spurious procedural issue which the Ninth Circuit did not even choose to mention and which cannot merit this Court's attention. Though a local District Court rule he cites requires any factual contentions on a motion to be supported by affidavits or declarations (Petition at 17), the District Court's order (Appendix B to Petition) shows that judicial notice of the prior action fully fulfilled the requirements of the rule.

CONCLUSION

This Court's numerous denials of certiorari in recent months have involved federal, Constitutional and other issues far more deserving of attention than that presented here. Petitioner's protracted litigation against TWA warrants no extention by review in this Court. For all the foregoing reasons, the instant petition should be denied.

Dated: November 19, 1982

Respectfully submitted,

BRONSON, BRONSON & MCKINNON

By ELLIOT L. BIEN
Attorneys for Respondent
Trans World Airlines, Inc.

CERTIFICATE OF SERVICE BY MAIL

I, Elliot L. Bien, declare under penalty of perjury that the following facts are true and correct:

I am a members of the bar of the United States Supreme Court, and am associated with the firm of BRONSON, BRONSON & McKINNON, Bank of America Center, 555 California Street, San Francisco, California 94104.

To the best of my knowledge the following document:

BRIEF OF RESPONDENT TRANS WORLD AIRLINES, INC. IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

was served and filed in the following manner:

True copies of said document were enclosed in an envelope, addressed as follows:

Clerk of the Supreme Court of the United States 1 First Street N.E. Washington, D.C. 20543	A. V. Costantini 565 John Daly Blvd. Daly City, CA 94105
(40 copies)	(3 copies)

Said envelopes were sealed and deposited so sealed and addressed on November 19, 1982, with the said documents enclosed therein and with the postage thereon fully prepaid, in the United States Post Office, in the City and County of San Francisco, State of California.

Executed on November 19, 1982, San Francisco, California.

ELLIOT L. BIEN